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No. 94-532

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANDREW WEIR SHIPPING LIMITED, formerly known as Bank Line Limited, SAFBANK LINE LIMITED, and SOUTH AFRICAN MARINE CORPORATION LIMITED,

Petitioners,

—v.—

JOHN BOWERS, JAMES A. CAPO, ALBERT CERNADAS, SERGIO CASSAINE, JR., FRANK LONARDO, S.Y. KUO, Captain, THOMAS POPOLA, and JOHN W. MILLARD, as Trustees for and on behalf of the NYSA-ILA Pension Trust Fund,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Second Circuit correctly hold that this Court's decision in *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344 (1992), with respect to the definition of employee within the meaning of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA") did not undermine the holding in *Korea Shipping Corp. v. NYSA-ILA Pension Trust Fund*, 880 F.2d 1531 (2d Cir. 1989), which has been followed by every court passing on the issue, that a steamship vessel carrier which is party to the longshore labor contract and pursuant thereto makes contributions to the pension fund that provides retirement benefits to longshoremen is an employer subject to the imposition of withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA")?

2. Was the Second Circuit correct in affirming the district court's upholding of the determination of the arbitrator that the formation of a joint venture which fails to fall within any of the reorganizations specified by Congress in MPPAA § 4218 and ERISA § 4069 does not constitute a corporate change exempt from withdrawal liability?

PARTIES TO THE PROCEEDING

The petitioners, appellants in the Court of Appeals, are Andrew Weir Shipping Limited, Safbank Line Limited and South African Marine Corporation Limited.

The respondents, appellees in the Court of Appeals, are John Bowers, James A. Capo, Albert Cernadas, Sergio Cassaine, Jr., Frank Lonardo, S.Y. Kuo, Captain, Thomas Popola and John W. Millard, as Trustees for and on behalf of the NYSA-ILA Pension Trust Fund.

RULE 29.1 STATEMENT

Respondents have no parent companies or subsidiaries to list pursuant to Rule 29.1 of the Rules of the Supreme Court.

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Petitioners,

—v.—

JOHN BOWERS, JAMES A. CAPO, ALBERT CERNADAS, SERGIO CASSAINE, JR., FRANK LONARDO, S.Y. KUO, Captain, THOMAS POPOLA, and JOHN W. MILLARD, as Trustees for and on behalf of the NYSA-ILA Pension Trust Fund,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents are the trustees of the NYSA-ILA Pension Trust Fund ("the Fund"), a joint labor-management multi-employer pension plan established to provide retirement benefits to longshoremen in the Port of New York and New Jersey ("the Port").

Petitioners Andrew Weir Shipping Limited, formerly the Bank Line Limited ("Bank Line") and South African Marine

Corporation Limited ("Safmarine") were obligated to and did make contributions to the Fund pursuant to the governing longshore collective bargaining agreement during the time they operated in the Port. Bank Line and Safmarine were parties to the labor contract by virtue of their membership in New York Shipping Association, the multi-employer bargaining association which acts as the representative of vessel carriers, stevedores and other waterfront employers in negotiating and administering collective bargaining agreements with the International Longshoremen's Association, AFL-CIO.

Respondents determined that when Bank Line and Safmarine created a new corporate entity, "Safbank Line Limited" to assume each of their cargo carrying operations, they permanently ceased covered operations and withdrew from the Plan. Pursuant to § 4202 of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1382, respondents assessed each of the carriers withdrawal liability.

Petitioners proceeded to arbitration with the Fund on the claim that the formation of Safbank constituted a corporate reorganization exempt from withdrawal liability under § 1398 of MPPAA. The arbitrator determined that the transaction did not constitute any of the corporate changes specified by the statute so that respondents had correctly imposed withdrawal liability upon Bank Line and Safmarine.

After the record was closed and the matter submitted to the arbitrator, this Court decided *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344 (1992). Petitioners raised to both the district court and court of appeals the question of *Darden's* effect on their status as MPPAA employers. The district court confirmed the arbitration award, and the United States Court of Appeals for the Second Circuit affirmed.

REASONS FOR DENYING THE WRIT

I

Petitioners Have Failed To Show A Conflict Between Established Supreme Court Precedent And The Universally Accepted Definition Of "Employer" For Purposes Of ERISA Title IV

Petitioners posit that in light of this Court's decision in *Darden* the Second Circuit erred in holding that Bank Line and Safmarine are "employers" for MPPAA purposes. The Second Circuit so held by adhering to the definition of employer it had previously formulated for purposes of Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), *i.e.*, the "contributing obligor" definition. This definition of a MPPAA employer is more expansive than the common law definition.

The Second Circuit's holding does not conflict with *Darden* or any other decision of this Court. In *Darden* the Court construed the term "employee", not employer, solely for purposes of ERISA Title I actions and adopted the common-law definition for that term. Neither the holding nor the language in *Darden* compels the application of a common-law definition in any other setting. The *Darden* Court expressed the view that a common-law construction of employee was appropriate in that case because there was no clear Congressional indication of a contrary definition.

Petitioners' argument that the Second Circuit is in conflict with *Darden* is based upon an untenable leap in logic—that the definition of the word "employee" in one title of a statute requires the parallel construction of a different word—employer—in another title of the statute. The fallacy of this argument is demonstrated simply by examining the definition

of "employer," in ERISA Title I which by its terms is more expansive than the common-law definition.[1]

The contributing obligor test for employer status was first enunciated by the Second Circuit in *Korea Shipping Corp. v. NYSA-ILA Pension Trust Fund,* 880 F.2d 1531 (2d Cir. 1989). The court of appeals held that to apply a common law standard for employers in Title IV cases would thwart Congress' intent to protect multiemployer pension plans from financial instability where a contributing entity ceased making contributions. 880 F.2d at 1537.[2] To effectuate MPPAA's policies, the Second Circuit, acknowledging the expansive definition of employer in Title I, adopted the following definition of a MPPAA employer: "a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants." *Id.*

In reaffirming its earlier decision in *Korea Shipping*, the decision of the Court of Appeals was consistent with every holding in the other circuit courts. Three other circuit courts of appeals have addressed the issue of the proper definition of employer for MPPAA purposes. *See Imel v. Laborers Pension Trust Fund For N. Cal.*, 904 F.2d 1327, 1331 (9th Cir.), *cert. denied,* 498 U.S. 939 (1990); *Carriers Container Council,*

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[1] Employer is defined in Title I as "any person acting as an employer or indirectly in the interest of an employer in relation to an employee benefit plan . . ." 29 U.S.C. § 1002(5).

[2] Petitioners are somewhat vague on the matter of who makes pension contributions in the Port of New York, *see* Petition at 7, although they do admit that they contributed to the Respondent Pension Trust Fund. *See* Petition at 9. In fact, virtually all contributions are made by vessel carriers which are not the common law employers of longshoremen. *Korea Shipping,* 880 F.2d at 1537-39. Petitioners' facile suggestion that withdrawal liability would merely be transferred to the direct employer stevedores, Petition at 13, is unrealistic. Since the common-law employers, the stevedores, have no contribution history, *see Korea Shipping*, 880 F.2d at 1539, they have no withdrawal liability. Thus, to adopt a common-law definition for MPPAA purposes would mean that no entity in the port would be responsible for withdrawal liability.

Inc. v. Mobile S.S. Ass'n, Inc.-ILA Pension Plan & Trust, 896 F.2d 1330, 1343-44 (11th Cir.), *cert. denied*, 498 U.S. 926 (1990); *Seaway Port Auth. v. Duluth-Superior ILA Marine Ass'n Restated Pension Plan*, 920 F.2d 503, 507 (8th Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991). All have agreed with the Second Circuit's "contributing obligor" definition. In each of those cases where this Court's review was sought, certiorari has been denied. Six district court judges have adopted the "contributing obligor" test for employer status. *See D.C. Transportation Services v. The Coca-Cola Bottling Co.*, 853 F. Supp. 1002, 1010 (N.D. Ohio 1994); *Philippines, Micronesia & Orient v. NYSA-ILA Pension Trust Fund*, No. 86 Civ. 8647, 1989 U.S. Dist. Lexis 15430 at *8 (S.D.N.Y. Dec. 26, 1989), *aff'd*, 909 F.2d 39 (2d Cir. 1990); *Bowers v. Transportacion Maritima Mexicana, S.A.*, No. 88 Civ. 0881, *slip op.* at 3 (S.D.N.Y. Oct. 31, 1988), *aff'd*, 901 F.2d 258 (2d Cir. 1990); *Delta S.S. Lines, Inc. v. NYSA-ILA Pension Trust Fund*, 688 F. Supp. 1560, 1563-66 (S.D.N.Y. 1988), *aff'd sub nom., Korea Shipping Corp. v. NYSA-ILA Pension Trust Fund*, 880 F.2d 1531 (1989); *Korea Shipping Corp. v. NYSA-ILA Pension Trust Fund*, 663 F. Supp. 766, 770 (S.D.N.Y. 1987), *aff'd*, 880 F.2d 1531 (1989); *NYSA-ILA Pension Trust Fund v. Uiterwyk Lines (West Africa) Ltd. (In re Uiterwyk Corp.)*, 63 B.R. 264 (M.D. Fla. 1986). Numerous district courts have rejected the common-law definition urged by petitioners for purposes of determining employer status under MPPAA. *See Refined Sugars, Inc. v. Local 807 Labor-Management Pension Fund*, 632 F. Supp. 630, 633, 635 (S.D.N.Y. 1986); *ILGWU Nat'l Retirement Fund v. Distinctive Coat Co.*, 6 Empl. Ben. Cas. (BNA) 2631, 2633-34 (S.D.N.Y. 1985); *Central Pennsylvania Teamster's Pension Fund v. Service Group Inc.*, 645 F. Supp. 996, 997 (E.D. Pa. 1985).

The Second Circuit itself has twice revisited the issue of MPPAA employer status in cases involving vessel carriers like petitioners that contributed to the very same pension fund

in the instant case, *see Philippines, Micronesia & Orient Navigation Co. v. NYSA-ILA Pension Trust Fund*, 909 F.2d 39, 41 (2d Cir.) (*per curiam*), *cert. denied*, 498 U.S. 983 (1990); *Bowers v. Transportacion Maritima Mexicana, S.A.*, 901 F.2d 258, 261-62 (2d Cir. 1990), and has reaffirmed its original test.

Petitioners' notion that *Darden* requires congruence between the definitions of employee and employer is untenable. In many instances the definition of employer for purposes of national labor law departs from the common law. Thus, this Court has found vessel carriers like petitioners to be longshore employers for purposes of the collective bargaining of work preservation provisions. *See NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490, 496 n.10, 512 (1980); *NLRB v. International Longshoremen's Ass'n*, 473 U.S. 61, 74 n.12 (1985). And the National Labor Relations Board has certified carrier members of the New York Shipping Association, of which petitioners are members, as longshore employers in the Port of New York. *See New York Shipping Ass'n*, 116 N.L.R.B. 1183, 1190 (1956); *New York Shipping Ass'n*, 107 N.L.R.B. 364 (1953).

The "contributing obligor" test for employer status is well-established and universally accepted. It is widely recognized as dictated by the structure of MPPAA[3] and necessary to accomplish the congressional objectives embodied in the statute. The invocation of *Darden* to attack the Second Circuit's holding that petitioners are employers for MPPAA purposes is merely distorted wishful thinking,—hardly a basis for Supreme Court review.

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[3] Under MPPAA a withdrawal occurs by reason of a cessation of covered operations that give rise to contributions or of the obligation to contribute. *See* 29 U.S.C. § 1383. Withdrawal liability is calculated on the basis of the withdrawing employer's contribution history. *See* 29 U.S.C. § 1391.

II

This Case Presents No Important Question Of Law Or Other Reason For Supreme Court Review

The core of this case concerns whether these particular petitioners in an isolated instance followed a statutory prescription for restructuring their corporate operations so as to entitle them to an exemption from withdrawal liability. The Second Circuit, like the district court and the arbitrator before it, determined that petitioners did not comply with the statute. The court of appeals' decision involved no important question of federal law which needs to be settled by this Court. Petitioners are correct in labelling this case "novel",—so novel, in fact, as to be idiosyncratic. The claims and facts in this case are unique and unlikely to be repeated, so that any decision this Court might issue would have little precedential value.

Their argument that their formation of a new corporate entity satisfied the statute's allowed changes in a business' structure amounts to no more than disagreement with the Second Circuit's application to the facts of MPPAA's unambiguous corporate terms of art, which describe exempted business transactions. Petitioners fail to cite any decision by any other court or authority that would cast doubt on the Second Circuit's determination that the formation of this joint venture was not a transaction entitled to exemption from withdrawal liability pursuant to § 1398 of MPPAA and § 1369(b) of ERISA.

Petitioners merely quibble with the Second Circuit's unassailable pronouncements on what constitutes corporate mergers and changes in business forms. Their only attack on the court of appeals' analysis of corporate division is to cite an inapposite anti-trust case, *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752 (1984), that has no bearing on a different statutory scheme like MPPAA.

The Second Circuit did no more than adhere to technical statutory language selected by Congress to effectuate the purposes and policies of MPPAA. Petitioners' argument is with Congress, not with the lower courts. Petitioners do not have the temerity to say that the joint venture issue is one of national importance. Their petition reserves the adjective "important" for the *Darden* issue.

Indeed, petitioners do not invoke any ground for Supreme Court review. They claim that the Second Circuit's decision is wrong, unfair, arbitrary and capricious—but not significant. They cite no conflict with Supreme Court precedent, no disagreement among the circuits, no burning issue of national concern. Their sole ground for seeking review is disagreement with the result below. Even if there were some merit to petitioners' complaints, this Court does not sit as a court of errors and appeals to correct mistakes of lower tribunals. Disappointment of a litigant is not a ground for certiorari. There is no reason for this Court to become involved.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: October 19, 1994

Respectfully submitted,

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